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BY MESSENGER

Mary L. Cottrell, Secretary

Department of Telecommunications and Energy

One South Station

Boston, MA 02110

Re: Docket No. D.P.U. 96-80/81

Dear Ms. Cottrell:

I write to bring to the Department's attention a recent decision by the United States Court of Appeals for the Ninth Circuit which holds, among other things, that a state commission may order an incumbent local exchange carrier ("ILEC") to combine unbundled network elements ("UNEs"), even if the combination does not currently exist in the ILEC's network. A copy of US West Communications v. MFS Intelenet, Inc., ___ F.3d __, 1999 WL 799082 (9th Cir. Oct. 8, 1999) is enclosed. This decision is directly relevant to issues before the Department.

On June 10, 1999, AT&T filed a motion for partial reconsideration of the Department's Phase 4-K decision. The Phase 4-K ruling relied upon the conclusion that the Eighth Circuit's decision that the Federal Communications Commission lacked the power to adopt 47 C.F.R. §§ 51.315(c)-(f) remains good law. Phase 4-K Order at 8. AT&T pointed out in its motion for reconsideration (at pages 8-10) that this conclusion is incorrect, because the Eighth Circuit's finding regarding Rules 315(c)-(f) cannot be squared with the Supreme Court's express finding that the FCC had the power to issue Rule 315(b), which bars ILECs from dismembering existing UNE combinations. See AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 119 S.Ct. 721, 736-738, 142 L.Ed.2d 835 (1999). AT&T also pointed out (at pages 10-18) that, in any case, the Department retains and should exercise its authority under Massachusetts law to order Bell Atlantic to provide competing local exchange carriers ("CLECs") with all technically feasible combinations of UNEs.

The Ninth Circuit has now confirmed what AT&T noted in its motion for reconsideration and elsewhere: the portion of the Eighth Circuit's decision regarding Rules 315(c)-(f) is no longer good law, because it cannot be squared with the express holding of the Supreme Court.

The Ninth Circuit held that the Washington Utilities and Transportation Commission ("UTC") acted lawfully when it ordered US West to "combine requested elements in any technically feasible manner either with other elements from [US West's] network, or with elements possessed by MFS." US West Communications, ___ F.3d at ___ & n.7, 1999 WL 799082, *6-*7 & n.7. The key portion of the Ninth Circuit's decision states as follows:

In sustaining a provision that prohibited the incumbent from separating already-combined elements before leasing, the Supreme Court held that the phrase, "on an unbundled basis," does not necessarily mean "physically separated"; an equally reasonable interpretation is that it means separately priced. AT & T, 119 S.Ct. at 737. The Court also held that the statutory language requiring incumbent carriers to "provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such

telecommunications service" indicates that network elements may be leased in discrete parts, but "does not say, or even remotely imply, that elements must be provided only in this fashion and never in combined form." Id. It follows, the Court held, that the FCC regulation prohibiting an incumbent carrier from separating already-combined network elements, see 47 C.F.R. § 51.315(b), was not inconsistent with the Act.

It also necessarily follows from AT & T that requiring U.S. West to combine unbundled network elements is not inconsistent with the Act: the MFS combination provision does not conflict with the Act because the Act does not say or imply that network elements may only be leased in discrete parts.

US West nevertheless argues that the Eighth Circuit's invalidation of the FCC regulation that required incumbent carriers to combine unbundled elements for competing carriers, see 47 C.F.R. § 51.315(c)-(f), requires this court to conclude that the MFS combination provision violates the Act. The Supreme Court opinion, however, undermined the Eighth Circuit's rationale for invalidating this regulation. Although the Supreme Court did not directly review the Eighth Circuit's invalidation of § 51.315(c)-(f), its interpretation of 47 U.S.C. § 251(c)(3) demonstrates that the Eighth Circuit erred when it concluded that the regulation was inconsistent with the Act. We must follow the Supreme Court's reading of the Act despite the Eighth Circuit's prior invalidation of the nearly identical FCC regulation.

US West Communications, ___ F.3d at ___, 1999 WL 799082, *6-*7.

When AT&T filed its motion for reconsideration of the Phase 4-K Order, it suggested that the Department delay ruling on that motion in the hope that Bell Atlantic would heed the Department’s strong encouragement and agree voluntarily to provide CLECs with access to all technically feasible combinations of UNEs. The proposal filed by Bell Atlantic on June 18, 1999, regarding new kinds of UNE combinations fails to do so, however, and instead proposes a new panoply of unlawful conditions upon CLEC access to UNE combinations.

The Department has properly ruled that approval of a lawful, nondiscriminatory means of provisioning newly combined UNEs is a necessary, though by no means a sufficient, "precondition for Bell Atlantic to receive a favorable ruling on a Section 271 filing." Phase 4-K Order at 27. Thus, BA-MA cannot assert that it has satisfied the competitive checklist set forth in 47 U.S.C. § 271 without making available newly combined UNEs in a lawful and non-discriminatory manner. BA-MA’s June 18 compliance filing falls far short of this standard.

On July 19, 1999, AT&T filed its initial response to Bell Atlantic’s purported "compliance filing" on UNE provisioning. AT&T explained in some detail the many ways in which Bell Atlantic’s latest UNE combinations provisioning proposal is unlawful. AT&T asked the Department to act upon AT&T’s pending motion for reconsideration, and to order Bell Atlantic to: (a) perform the functions necessary to combine unbundled network elements in any manner that it currently uses such elements in combination to provide service to itself or its customers, and (b) perform the functions necessary to combine network elements in ways that they are not currently combined in the BA-MA network, unless BA-MA meets its burden of proving to the Department that the requested combination is not technically feasible.

The recent Ninth Circuit’s decision makes clear that the Department has the authority to enter such an order. The time has come for Bell Atlantic to be required to provide all technically feasible combinations of UNEs, and to permit CLECs to use any technically feasible manner of the CLEC’s choosing for accessing combinations of network elements. The Department should allow AT&T’s pending motion for reconsideration and enter such an order, in accordance with the Ninth Circuit’s ruling.

Thank you for your assistance.

Very truly yours,

Kenneth W. Salinger

enclosure

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